

Same-Sex Marriage: The Court's Decisions and Public Opinion

**An Honors Thesis (HONR 499)**

**by**

Autumn Hempfling

**Thesis Adviser**

Brad Gideon

**Ball State University  
Muncie Indiana**

December 2012

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A handwritten signature in black ink, appearing to read 'Brad Gideon', with a stylized, cursive script.

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Abstract

The struggle over civil rights has a long history in the United States and it still continues today. The issue of same-sex marriage has recently been making its way through the legal system and is headed in the direction of the Supreme Court challenging the constitutionality of the federal Defense of Marriage Act. Examining past civil rights and same-sex marriage cases can help predict what methods the Supreme Court will use to make their decision on same-sex marriage. Including the progress of the gay-rights movement in the examination of past cases can show the effects of social movements on public opinion and court decisions and how it will effect the Supreme Court's decision on this particular issue. I analyze all of these factors to provide an educated prediction of how the Supreme Court will rule on same-sex marriage.

#### Acknowledgements

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### Same-Sex Marriage: The Courts' Decisions and Public Opinion

Charlie Morgan joined the U.S. Army in 1982, right after graduating from high school. She has been in the military ever since, in one branch or another, and is now a Chief Warrant Officer in the New Hampshire National Guard. In 2008, Charlie was diagnosed with breast cancer and underwent a double mastectomy, as well as chemotherapy. She recovered enough to serve a yearlong tour in Kuwait in 2011. However, in January 2012, Charlie found out that the cancer had spread to her lymph nodes. The doctor told her that if she underwent chemotherapy she would have two years to live, but they would be made difficult by the treatments. Without the chemotherapy, the doctor gave her six months to live. Charlie chose to go without the chemotherapy and enjoy her last few months with her family. So far, Charlie has made it seven months and she keeps on fighting, but cancer isn't the only thing that Charlie has to fight. In September Charlie celebrated the end of "Don't Ask Don't Tell" by going on MSNBC and talking about her family. Charlie and her wife Karen were in a civil union for 12 years and were able to transform that into a marriage in New Hampshire last year. They have a five-year-old daughter named Casey. Although the two women are legally married in New Hampshire, if Charlie dies, federal law dictates that Karen will not be eligible for survivor benefits. The federal Defense of Marriage Act doesn't allow Karen to receive military spouse benefits, such as health insurance and the right to be buried next to Charlie, because they are in a same-sex marriage. Charlie is terrified that the wife that she loves will not be taken care of if she dies (Connor, 2012).

Over the years countless civil rights cases have gone before the Supreme Court for judgment, each one making its own mark on history. Civil rights cases are often accompanied by strong public opinion, and it is up to the Supreme Court to reconcile



those opinions with the Constitution to determine the extent of citizens' rights according to the United States government. In recent years, the gay rights movement has been growing and court cases related to gay rights have also been increasing. Same-sex marriage cases around the country have been questioning past court decisions along with current legislation and are heading in the Supreme Court's direction. No matter what the decision, if and when the Supreme Court decides on the issue of same-sex marriage, it will be another important page in the history book of civil rights. Examining the history of civil rights, the gay rights movement, and same-sex marriage can help us predict how the Supreme Court might rule on the same-sex marriage cases heading their way. Comparing current same-sex marriage cases to past civil rights cases will predict what method the Supreme Court might use to decide on the controversial issue.

Almost all of the current same-sex marriage cases that could be headed to the Supreme Court deal with the constitutionality of the federal Defense of Marriage Act, also known as DOMA. The introduction of DOMA is widely understood to be a legislative reaction to the court decision in *Baehr v. Lewin* in 1993 that ruled the Hawaii law restricting same-sex marriage unconstitutional. Although it was overturned, that court decision represented the possibility for same-sex couples to pursue marriage (Golinski v. Office of Personnel Management, 2012). The 104th Congress of the United States passed the bill on January 3, 1996. Section 2 of the Act declares that states do not have to recognize same-sex marriages performed and recognized in other states or territories. Section 3 of DOMA defines marriage as between a man and a woman and also clarifies the term "spouse" in reference to someone of the opposite sex (Defense of Marriage Act of 1996). Although States reserve the right to pass their own laws on same-sex marriage,

the federal DOMA prohibits those couples from ever being recognized as married by the federal government and therefore denies them federal benefits and protections granted to other married couples.

According to the reply brief for Office of Personnel Management, et al. in the court case *Golinski v. Office of Personnel Management*, the Attorney General announced to Congress on February 23, 2011 that himself and the President decided that Section 3 of DOMA does violate the equal protection clause when it is applied to same-sex couples legally married under the state's law. They agreed that while the Department of Justice would no longer defend Section 3 of DOMA, the Executive Branch would still enforce it. The Attorney General stated that this decision was made to respect Congress, while also recognizing the courts role as final authority on the constitutional issues at hand. The Attorney General and the President also declared that they conclude a heightened standard should apply to DOMA litigation. In place of the DOJ, the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) took over in court to defend Section 3 of DOMA.

Karen Golinski is an employee of the U.S. Ninth Circuit Court of Appeals in San Francisco who is a part of the Federal Employees Health Benefits Plan (FEHBP). Golinski is married to a woman under the laws of California, but was denied the option of making her wife a beneficiary because of the application of Section 3 of DOMA to the Federal Employees Health Benefits Act (FEHBA). Golinski filed suit against the Office of Personnel Management arguing the unconstitutionality of Section 3 of DOMA and that the Office of Personnel Management misread FEHBA when applying it to her situation. *Golinski v. Office of Personnel Management* is now one of the several current same-sex

marriage cases that are possibly headed to the Supreme Court arguing that Section 3 of DOMA is unconstitutional (*Golinski v. Office of Personnel Management*, 2012).

The court decided that it was appropriate to use a heightened level of scrutiny for this case because sexual orientation fit all four characteristics for a quasi-suspect class previously determined by the Supreme Court. The first characteristic is that homosexuals have historically been mistreated, stereotyped, and discriminated against. The second characteristic is that there is no evidence to show that homosexuality effects people's abilities to contribute to society in any way, shape or form. The third characteristic is that studies show that sexual orientation is considered an immutable characteristic that most people do not have a choice in and is a defining part of their identity that they should not be asked to change. The court found that although there have been some efforts made to stop discrimination against homosexuals, they lack meaningful political power as a distinct minority group to have an effect politically, which fits the fourth and final characteristic (*Golinski v. Office of Personnel Management*, 2012).

Examining the case under heightened scrutiny, the court had to determine whether the defendants provided ample evidence that the statute significantly aided a government objective. The district court did not believe that withholding benefits from same-sex couples does anything to encourage opposite-sex partners to procreate and practice good parenting. They also noted that the eligibility to marry has never been contingent upon the ability to procreate. Therefore, the encouragement of procreation and responsible parenting is not legitimately a related government objective. The court also didn't find defending and promoting tradition to be a significant government objective because tradition cannot be the only reason for a law and the government must have an agenda

separate from tradition. They did not believe that the preservation of morality is a legitimate government objective either because forcing a moral belief of the majority on a minority cannot justify legislation. The court declared that their job is not to mandate a moral code, but instead to provide liberty for all. They dismissed the final argument for the statute of protecting government resources, stating that there is no evidence to support the idea that same-sex married couples would harm the fiscal program, nor should it be a legitimate reason to block a certain group of people from receiving benefits. Therefore, the court could not find any rationale that the statute legitimately aided a government objective (*Golinski v. Office of Personnel Management*, 2012).

The district court ruled that Section 3 violates the equal protection clause on February 22, 2012. Two days later, BLAG appealed to the Ninth Circuit Court of Appeals. In July 2012, the DOJ and Golinski filed petitions of certiorari before judgment for the United States Supreme Court, and in August BLAG followed suit. The Ninth Circuit court canceled the oral arguments until the United States Supreme Court passes judgment on the petitions for a writ of certiorari (*Gay and Lesbian Advocates and Defenders*, 2012). The Supreme Court has yet to make a decision, so for now this case is pending and Karen is still unable to make her wife her beneficiary.

It isn't only same-sex couples that are questioning the constitutionality of DOMA. Some states that allow same-sex marriage and other benefits for same-sex couples are concerned that the government will punish them for not complying with DOMA by taking away their funding. *Massachusetts v. U.S. Department of Health and Human Services* is another current pending same-sex marriage case; however, this case questions the constitutionality of DOMA under different provisions. The Commonwealth of

Massachusetts filed this suit as a companion case to other cases filed by same-sex couples in Massachusetts against federal agencies. Massachusetts' Medicaid Program does not comply with DOMA by allowing same-sex married couples to combine their income. The Commonwealth also allows veterans to be buried with their same-sex spouse, which violates DOMA. In light of these practices, the Department of Health and Human Services has the authority to rescind federal funding for these programs (*Massachusetts v. U.S. Department of Health and Human Services*, 2012).

Massachusetts argued that DOMA violates the Tenth Amendment by interfering in areas of state authority. The state also argued that it violates the Spending Clause by forcing the states to discriminate against their citizens in order to receive federal funding for joint programs. On July 8, 2012 the court ruled that DOMA violated the Tenth Amendment and forbid the federal government from enforcing the statute on Massachusetts. The defendant appealed the court's ruling and asked for a stay of the injunction until the appellate decision, which was granted (Schad, 2012). The appellate court found this case especially difficult because it was concerned with equal protection and federalism. Even though Massachusetts questioned DOMA on grounds of violating the Tenth Amendment, the appellate court did not find that argument compelling and instead examined Congress's justifications for DOMA like other courts have done (*Massachusetts v. U.S. Department of Health and Human Services*, 2012).

The court did not agree with the rationale of protecting government resources because recent analysis shows that DOMA will most likely cost the government money. They also disagree with the justification that DOMA helps promote responsible parenting because DOMA does not stop same-sex couples from adopting children, nor does it give

incentives or benefits to opposite-sex married couples. The court does not find the Congressional justification of morality substantial because precedent shows that morality is not a good enough reason for legislation. When they passed DOMA, Congress made an assertion that this bill was a way to put a hold on the situation while they had time to reflect. The appellate court did not find this to be accurate because it has no expiration date.

The court decided that the rationales offered for Section 3 of DOMA are not adequate and found it unconstitutional, agreeing with the district court (*Massachusetts v. U.S. Department of Health and Human Services*, 2012). Both the Commonwealth and BLAG filed conditional cross-petitions for certiorari to the United States Supreme Court (*Gay and Lesbian Advocates and Defenders*, 2012). In anticipation of the Supreme Court reviewing the case from the certiorari, the appellate court stayed their mandate and it is still pending (*Massachusetts v. U.S. Department of Health and Human Services*, 2012).

*Windsor v. United States* is a same-sex marriage case that was recently rejected by the United States Supreme Court and left to the judgment of a federal appeals court. Edie Windsor met Thea Spyer in New York City in 1963. The two women began a committed relationship and as soon as it became an option, Windsor and Spyer registered as domestic partners. When Spyer's health began to become a problem in 2007 the couple got married in Canada, which is a jurisdiction that permitted same-sex marriage. In February of 2009, Spyer passed away and left her estate to Windsor. The Federal Defense of Marriage Act did not recognize their marriage and prevented Windsor from qualifying for the unlimited marital deduction. As the executor of Spyer's estate, Windsor was required to pay \$363,053 in federal estate taxes. Windsor decided to file suit on

November 9, 2010 to be refunded for the federal estate tax and also to declare that Section 3 of DOMA violates the Equal Protection Clause (*Windsor v. United States*, 2012).

The United States District Court for the Southern District of New York granted Windsor's motion for summary judgment on June 6, 2012 that argued that homosexuals are a suspect class and DOMA should be put under strict constitutional scrutiny (*Windsor v. United States*, 2012). At the same time, the court also denied the BLAG motion for dismissal (*Gay and Lesbian Advocates and Defenders*, 2012, *Windsor v. United States*, 2012). The district court ruled in favor of Windsor, refunding her money and declaring that Section 3 of the Federal Defense of Marriage Act is unconstitutional as applied to the Plaintiff. Following the court's decision, BLAG appealed to the Second Circuit United States Court of Appeals questioning the district court's granting of summary judgment (*Gay and Lesbian Advocates and Defenders*, 2012).

In early September both sides filed petitions for certiorari before judgment to the United States Supreme Court, however, the petitions were rejected and the Second Circuit court continued with their process (*Gay and Lesbian Advocates and Defenders*, 2012). They affirmed the district court's granting of Windsor's motion for summary judgment. They decided that homosexuals met all four criteria that the Supreme Court requires for a group to qualify as a quasi-suspect class. Homosexuals have historically been the target of discrimination and persecution. Homosexuality has no physical or mental effect on people's ability to contribute to society. Sexual orientation is a characteristic defining enough to identify a distinct minority class. Homosexuals are politically powerless, which refers to their inability to protect themselves from the

discrimination of the majority. All of these factors convinced the court that DOMA required heightened scrutiny.

The court also found that DOMA did not withstand intermediate scrutiny, which says that the statute must legitimately aid a government objective. Congress said that one reason for passing DOMA was to enforce uniformity for same-sex couples across the country; however, historically the States have always been left in charge of creating their own marriage laws which can result in diversity. Also, DOMA only defines one aspect of domestic relations law, which leaves many other issues inconsistent across states. The court decided that because DOMA is so broad it is not substantially related to fiscal matters, and in fact it impairs some federal laws that are not related to public fiscal concerns at all. The court does not believe that the traditional views of a practice are good enough reasons to prohibit it; therefore, the preservation of marriage is not a justification for DOMA. They do not see how DOMA gives an incentive to different-sex couples to perform responsible procreation. Ultimately, the court does not find that DOMA is significantly related to any important government interest (*Windsor v. United States*, 2012). Based off of all of their findings, in October 2012, the second circuit court's final decision held that Section 3 of DOMA violates the equal protection clause and is unconstitutional (*Windsor v. United States*, 2012).

The Supreme Court's decision not to hear this case could mean several different things. There are many other same-sex marriage cases with petitions for writ of certiorari to the United States Supreme court that are still pending judgment. The Supreme Court's decision not to hear this case in particular could predict that they will deny all petitions, however, I would argue that it most likely means the court didn't think this was the right



case to rule on this constitutional issue. It is important to note that the constitutional measurements the court used to rule on this case are the same measurements that the other two current cases have used. That could be an indication of the method that the Supreme Court will use if and when they rule on the issue of same-sex marriage, especially compared to past same-sex marriage and civil rights cases.

Current same-sex marriage cases mostly focus on how Section 3 of DOMA violates certain constitutional provisions, mainly the Equal Protection Clause of the and the Due Process Clause of the Fifth and Fourteenth Amendments. However, the argument that some states are making is that DOMA violates the Tenth Amendment, which declares that states have any powers that are not specifically given to the federal government, nor taken away from the states in the Constitution (U.S. Const. amend. X). The Equal Protection Clause refers to the part of the Fourteenth and Fifth Amendment that promises all citizens the “equal protection of the laws (U.S. Const. amend. XIV, § 1).” It keeps both state and federal government from using the law to unfairly take away people’s rights based upon superficial classifications. The Due Process Clause refers to the parts of both the Fifth and Fourteenth Amendments that protect citizens from being deprived of “life, liberty, or property without due process of law (U.S. Const. amend. XIV, § 1, U.S. Const. amend. V).” The Courts interpret the Due Process Clause in two different ways: procedural due process and substantive due process. The court cases against DOMA mainly refer to substantive due process which holds that “all governmental intrusions into fundamental rights and liberties be fair and reasonable and in furtherance of a legitimate governmental interest (Legal Information Institute, 2012).”

The conflict over same-sex marriage in the courts has been going on for a long time, and the gay rights movement has been going on even longer. The sixties marked the start of organized protesting when Dr. Frank Kameny led the first picket line at the White House in 1965. Students at Columbia University followed suit and founded the first gay student organization in 1966. Building organizations to help the cause is an important step for developing social movements (Moyer, 2012). Yet, the actual beginning of the gay rights movement is said to be in 1969 with the Stonewall Rebellion (Time, 2012). At that time police routinely raided gay bars to arrest transvestites and harass the homosexual patrons. However, when police raided the Stonewall Inn on June 17, 1969, the customers decided to fight back by throwing things at the police officers. The officers retaliated by beating and arresting many of the protestors. The Stonewall Rebellion has been marked with an annual gay pride march and the Stonewall Bar was labeled a national historic landmark (The New York Times, 2009). One way that social movements become more successful is when catalytic events produce awareness in the public; the Stonewall Rebellion can be considered the gay rights movement first catalytic event (Moyer, 2012).

Another important step for successful social movements is filing legal cases to help create a legal foundation for the issue (Moyer, 2012). The first court case challenging a law restricting same-sex marriage quickly followed in 1971 in *Baker v. Nelson* (American Civil Liberties Union, 2006). Richard Baker and James McConnell applied for a marriage license from Hennepin County District Court in Minnesota. The clerk, Gerald R. Nelson, declined their license solely because they were the same sex. Baker filed a suit arguing that the States interpretation of Minnesota Law, Minn.St. c. 517,

which governs marriage, is unconstitutional because it violates the Fourteenth Amendment. The trial court ruled that the clerk was not required to issue a marriage license, and specifically ordered him not to issue a license to Baker and McConnell. This decision was appealed up to the Supreme Court of Minnesota. The court declared that the common usage of the term “marriage” is an important factor and that it refers to the union of two people of the opposite sex. They reasoned that the original writers of the marriage statutes wouldn’t have used the word to refer to anything else. The addition of the words “husband and wife” and “bride and groom” to the statute illustrates to the court that it strictly refers to heterosexuals. The court declared that they do not believe marriage is a fundamental right and that the idea of marriage between a man and a woman, involving procreation and family, can be traced back to the book of Genesis. Based off of all these reasons, the court affirmed the previous court’s decision and ruled that the statute did not authorize same-sex marriage and therefore it was prohibited (Baker v. Nelson, 1971).

In 1977, Harvey Milk was the first openly gay politician to make a splash when he was elected to the San Francisco board of supervisors. Unfortunately, a fellow city supervisor did not agree with his accomplishment and murdered Milk within a year. During the 1980’s the outbreak of AIDS led to increased discrimination of homosexuals. In 1987, Randy Shilt, a journalist for the *San Francisco Chronicle*, released his book, *And the Band Played On: Politics, People, and the AIDS Epidemic*, which explained how neglecting the gay community, and incompetence combined to increase the spread of AIDS. The book quickly became a critically acclaimed best seller (Time, 2012). The

support of politicians and educating the public on the issues are both important to the success of a social movement and were key in the growth of the gay rights movement.

It wasn't until the 1993 case of *Baehr v. Lewin*, that a court ruled a law prohibiting same-sex marriage was unconstitutional. On December 17, 1990, Baehr and Dancel, Rodrigues and Pregil, and Lagon and Melilio, all applied for marriage licenses with the Department of Health (DOH) in the State of Hawaii. The DOH denied all three couples licenses solely on the fact that they were same-sex couples. In 1991, the couples filed a suit with the Circuit Court of the First Circuit of Hawaii arguing that the Hawaii Revised Statutes (HRS) @ 572-1 was unconstitutional the way the DOH interpreted it because it denied them a marriage license because of their sexual orientation (*Baehr v. Lewin*, 1993). The court was the first to rule that prohibiting same-sex marriage was discrimination. The case was then sent back to court in order to determine whether the states discrimination was justifiable. In 1996, the court ruled that the state was not justified in its discrimination and they could not deny same-sex couples marriage licenses. The state appealed the courts decision. In 1998, Hawaii passed an amendment to their constitution that took away same-sex couples guarantee of equality and allowed the legislature to define marriage as between a man and a woman. After the new legislation was enacted, the high court was unable to justify the lower courts ruling and overturned their decision. However, Hawaii also passed legislation that provided same-sex couples with some of the protections they couldn't get through marriage (Lamda Legal, 2012).

When he was running for President of the United States, Bill Clinton made a campaign promise to reverse the executive order not allowing homosexuals to serve in the military. The "Don't Ask, Don't Tell" policy was passed into law after Clinton

became president, which meant that homosexuals could serve in the military as long as they didn't tell anyone or perform homosexual acts (Time, 2012). Getting political leaders to enact a policy change in favor of the cause is essential in a successful social movement and this was a great achievement for the gay rights movement at the time (Moyer, 2012). As a reaction to the *Baehr v. Lewin* decision, Congress passed the Defense of Marriage Act in 1996, which denied same-sex couples of the federal benefits given to opposite-sex married couples. In 2001, other countries such as the Netherlands, Germany, and Finland passed laws that allowed same-sex couples to have civil unions (Time, 2012).

In 2003, *Goodridge v. Department of Public Health* legalized same-sex marriage in Massachusetts. In 2001, each of the same-sex couples involved had applied for marriage licenses from clerk's offices. Each of the couples was denied a license on the basis that Massachusetts does not allow same-sex marriage. The couples brought a suit against the department and commissioner arguing that the law violated the Massachusetts constitution. The Superior Court dismissed the couples' complaints and ruled for the department. The couples filed for an appeal and both parties asked for direct appellate review. The appellate court reasoned that the Massachusetts Constitution guarantees equality for everyone and prohibits the idea of second-class citizens. They concluded that the push for marriage restriction came from prejudices against homosexuals and that the Constitution cannot allow them. The appellate court ruled that limiting the benefits of marriage to opposite-sex partners violates the concepts of individual liberty and equality protected under the Massachusetts Constitution. They defined marriage as a "union of

two persons as spouses” and overturned the previous court’s ruling (Goodridge v. Department of Public Health, 2003).

The Mayor of San Francisco issued the first same-sex marriage certificates in the United States in 2004, while at the same time the House of Lords in the U.K. passed the Civil Partnership Act along with South Africa, New Zealand, Israel, and Canada. Other states followed California’s cue and in 2007 New Hampshire, Oregon, and Washington legalized civil unions or domestic partnerships for same-sex couples. In 2008, California and Connecticut’s Supreme Court legalized marriage, along with Nepal and Norway. Same-sex marriage was legalized in Sweden, Iowa, Vermont, Maine, and New Hampshire in 2009, while California’s Supreme Court upheld Proposition 8, which defines marriage between a man and a woman. President Obama overturned Clinton’s initiative and put an end to “Don’t Ask Don’t Tell” in September of 2011 (Connors, 2012). Same-sex marriage continues to be controversial across the country and around the world (Time, 2012).

Civil rights cases are often a result of conflicts in society relating to people’s identities or beliefs. They usually involve matters that are an intimate part of people’s lives such as race, ethnicity, or religion. Because of that, they are often accompanied by strong public opinions, which can impact the Supreme Court’s decisions in different ways. Sometimes public opinion can have a big impact on the court’s decision, while other decisions ignore public opinion and are determined by using constitutional measurements. A change in public opinion can also lead the way for court cases to follow suit. Landmark Supreme Court cases are a great illustration of the variety of methods of decision making when it comes to civil rights issues.

In *Bowers v. Hardwick* in 1986, Michael Hardwick challenged the constitutionality of the Georgia law that declared oral and anal sex illegal on the grounds that consensual sodomy is private. One of the court's main arguments was that the prohibition of consensual sodomy has ancient roots in the traditions and history of this country. The court cited that sodomy was banned as far back in history as common law and continued into 1961 when all 50 states had laws against sodomy. The court compared consensual sodomy in the home with other crimes that could be committed in the home such as illegal drug use or other sexual crimes. The Supreme Court upheld the Georgia law and ruled it constitutional (Epstein & Walker, 1992, p. 279-280).

The opinion of the Supreme Court in *Bowers v. Hardwick* illustrates how the majority public opinion that sodomy is immoral affected the Supreme Court's ruling on the subject. The comparison of consensual sodomy in the home with other serious crimes represented how the majority viewed homosexual activity as an illegal offense. The court's reasoning on sodomy resembled the Supreme Court of Minnesota's reasoning in *Baker v. Nelson* about same-sex marriage. The majority public opinion at the time was that same-sex marriage was immoral and unnatural. Both courts traced the issue back in history to show the legitimacy of their ruling, arguing tradition and status quo. Both of these cases are an example of the Supreme Court making its decision based off of the majority public opinion.

In *Roe v. Wade* in 1973, Norma McCorvey used the pseudonym Jane Roe to challenge the constitutionality of the Texas law that made abortions illegal. There have always been strong public opinions surrounding the issue of abortion that stem from different philosophies, religions, family views and values, and moral standards. When



this case went before the Supreme Court, they tried to make the best decision based on constitutional measurements and not the emotions and preferences of public opinions. They concentrated on determining whether the reasons put forth historically for making abortion illegal were legitimate. One justification had to do with abortion being a medical procedure. The court reasoned that abortion procedures are fairly safe now, however, there is concern about proper medical procedures to ensure the safety of the patient. They also acknowledged that the risk to the woman does increase in the later stages of pregnancy, which calls for some concern. Another reason was the State's interest in protecting prenatal life, since some argued that life began at conception. The court decided that the Supreme Court had in the past identified a person's right to privacy and that "the right has some extension to activities relating to marriage, procreation, family relationships, and child rearing and education." They found that the broad definition included a woman's decision to terminate her pregnancy. The court ruled that depriving a woman of this choice could cause harm medically and psychologically not only for the woman, but also for other people directly affected, including the child. After disagreeing with all of the justifications for abortion laws, the Supreme Court ruled the laws unconstitutional, however, they recognized the need for some state regulation in the matter (Epstein & Walker, 1992, p. 294-303).

The issue of abortion is similar to the issue of same-sex marriage in that both issues have strong religious and moral ties which lead to strong public opinion. The court's method of decision-making in *Roe v. Wade* was similar to the court's method in *Windsor v. United States*. Instead of basing their decision on public opinion, both courts based their decision on whether the reasoning behind the law was legitimate and stood up



to constitutional measurements. Although they are different issues, the court found that neither law aided a government objective and therefore were unconstitutional, no matter what the public thought.

In the Supreme Court case *Loving v. Virginia* in 1967, Mildred and Jeter Loving argued that the Virginia miscegenation law, that didn't allow whites and blacks to marry, violated the Equal Protection Clause and the Fourteenth Amendment.. The Supreme Court examined how the state's justifications for the law measured up. The State argued that the law did not violate the Equal Protection Clause because it treated white and blacks the same, however, the court declared that it was still discrimination based on race and therefore not justifiable. The Supreme Court noted that the Equal Protection Clause requests that racial classifications be examined with rigid scrutiny and can only be upheld if the law is essential in a state objective that is not related to racial discrimination. The State did not give any other rational basis to treat interracial marriages differently, therefore the Supreme Court found the law unconstitutional.

This landmark civil rights case closely resembles the current same-sex marriage cases and is often referenced in the arguments. While the court uses constitutional measurements to come to a decision in this case, public opinion also plays a part. The 1960's were an important time for civil rights and a period of change in public opinion. Public opinion began to see racial discrimination as wrong and soon it was made illegal. The changing public opinion and federal laws made the Supreme Court's decision in *Loving v. Virginia* and other racial discrimination cases more acceptable (Epstein & Walker, 1992, p. 486-488). The public opinion of same-sex marriage has slowly started

shifting as the gay rights movement has grown over the years, which could have an effect on the Supreme Court's decision.

Charlie Morgan has spent the last several months fighting cancer, spending time with her daughter, and traveling all over the world to fight for the rights of her wife. She has held on so she can make sure her wife and family are taken care of and has equal rights in this world. She hopes that she will live to see the day that DOMA is repealed and same-sex marriage is legalized. By examining the various methods of decision-making and trends in same-sex marriage cases, along with civil rights cases and the gay rights movement, we should be able to predict what the Supreme Court will decide about same-sex marriage, and if Charlie Morgan's fight will be successful.

The decisions of early same-sex marriage cases tended to use moral and tradition arguments that relied on the majority public opinion. In *Baker v. Nelson* the court based its opinion on the traditional connotation of marriage, declaring that historically it is most likely what the writer meant. The court also noted that the association of marriage with family and procreation goes back to genesis (*Baker v. Nelson*, 1971). This method of decision-making seems to be common in the early legal stages of civil rights issues. For example, it is similar to the court's reasoning in *Bowers v. Hardwick* in 1986, where the court reasoned that the prohibition of sodomy had ancient roots in tradition and history dating back to at least common law, which echoed the public's opinion (Epstein & Walker, 1992, p. 279-280).

In contrast, the current same-sex marriage cases that are being appealed, the courts have based their decisions on constitutional measurements similar to those used in *Roe v. Wade* and *Loving v. Virginia*. In both of these landmark civil rights cases, the

Supreme Court reasoned that the justifications for the laws in question did not live up to scrutiny and therefore were not constitutional (Epstein & Walker, 1992, p. 294-303, 486-488). In *Golinski v. Office of Personnel Management*, *Massachusetts v. U.S. Department of Health and Human Services*, and *Windsor v. United States* the courts have been making their decisions based on constitutional measurements and the justifications for DOMA have not lived up to scrutiny. This illustrates that as civil rights issues progress through the legal system, courts tend to look for substantial constitutional reasoning rather than strictly relying on public opinion. Therefore, I believe that the Supreme Court will ultimately use constitutional measurements to make their decision rather than public opinion.

However, I do think that public opinion will play a small role based off of the similarities to *Loving v. Virginia*. In that case the changing public opinion of racial discrimination in the 1960's supported the Supreme Court's decision and made it more acceptable (Epstein & Walker, 1992, p. 486-488). This demonstrates the power and effect that a successful social movement can have on legal decisions. At the time of *Loving v. Virginia*, the civil rights movement had made progress in changing the majority public opinion through catalytic events, organizations, spreading awareness, political support, and changing policies. I believe that the changing public opinion of homosexuality and same-sex marriage could play a similar role in the Supreme Court's decision on same-sex marriage. The gay rights movement has made progress in changing majority opinion through similar tactics to the point where I think the Supreme Court's decision to find DOMA unconstitutional would be more acceptable than in the past.

The courts that have heard current same-sex marriage cases recently have found that sexual orientation is a quasi-suspect class based on criteria set up by the Supreme Court, which means that cases involving discrimination based on sexual orientation should be held to a heightened level of scrutiny. When examined under a heightened level of scrutiny DOMA must aid a government objective to be upheld. The courts have found that the justifications given by the federal government for enacting DOMA do not aid in a government objective and are consequently unconstitutional. It is my prediction, based on past civil rights cases, that the Supreme Court would use a heightened level of scrutiny to examine the constitutionality of DOMA and find it unconstitutional.

If the Supreme Court sticks strictly to ruling on the constitutionality of DOMA, the question of same-sex marriage will still fall to the States. At that point, I believe that public opinion will play a big role in whether legislation is passed because State legislatures represent a smaller constituency with a more homogeneous public opinion than that of the United States. If the future of this issue plays out like I am predicting, there is a chance for another same-sex marriage case to go before the Supreme Court questioning the constitutionality of State laws against same-sex marriage. However, based on *Loving v. Virginia* I believe that the Supreme Court will rule State laws against same-sex marriage unconstitutional unless they can produce a justification that the law substantially aids a government objective. Once the Supreme Court uses a heightened level of scrutiny to examine cases concerned with discrimination based on sexual orientation, it will be difficult to pass a law prohibiting same-sex marriage based on the current justifications.

There seems to be a trend in history when dealing with civil rights issues. It starts with a minority being seen as wrong and immoral by the majority for things such as what they look like, who they love, or what they believe. In turn the majority discriminates against them for it. However, the minority doesn't give up and they do everything they can to raise awareness and change the majority's opinion. As social movements progress the minority establish legal and moral foundations for their cause by pursuing court cases. The United States legal system is designed to be unbiased and fair, so it tends to be the best avenue to address discrimination. History shows that eventually, as issues work their way through the legal system and public opinion changes, the Supreme Court usually takes a stand for the minority and puts a stop to the discrimination against them. The evidence says that the same will be true for the issue of same-sex marriage. The gay rights movement has made substantial progress through the years in the legal system and in changing public opinion. Hopefully, for people like Charlie Morgan and her family, the evidence is right and her family can have the benefits they deserve if Charlie doesn't make it.



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